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# The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?

## I. INTRODUCTION

The United Nations Charter ("Charter"), signed at the 1945 San Francisco Conference,<sup>1</sup> represents the world's initial response to two world wars and the atrocities of the Hitler regime.<sup>2</sup> Although the Charter proposes multiple purposes and principles, it provides the means with which to implement only one of these purposes, the maintenance of peace and security.<sup>3</sup>

The power to maintain international peace and security, vested in the Security Council ("Council") by article 42 of the Charter, arguably conflicts with the Charter's purpose of "promoting and encouraging respect for human rights and . . . fundamental freedoms," set forth in article 1.<sup>4</sup> Further, the subsequent evolution of human rights law, which implements article 1, raises the possibility that the Council's unfettered exercise of its sanctioning power violates customary human rights law.

This Comment explores whether the Council may violate human rights law when executing its peace-keeping powers. The language of the Charter appears to vest unlimited power in the Council. This

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1. U.N. CHARTER; LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 8 (3d ed. 1969).

2. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 227 (1958); see also *Opening Session of the Conference*, Doc. 7, 2 U.N.C.I.O. Docs. 6 (1945) [hereinafter *Opening Session*]. "We must not continue to sacrifice . . . our youth merely to check madmen, those who in every age plan world domination." *Id.* at 6.

3. U.N. CHARTER arts. 39, 41, 42. Article 39 declares that the Security Council "shall determine" whether a breach of peace has occurred, and "shall make recommendations or decide what measures shall be taken." *Id.* art. 39. Article 41 provides that the Security Council "may decide what measures . . . to . . . employ[] . . . and . . . [may] call upon Members . . . to apply such measures." *Id.* art. 41. Article 42 states that the Security Council "may take such action . . . as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.* art. 42. These articles affirmatively empower the Security Council to take action. In contrast, article 62 merely empowers the Economic and Social Council to "make recommendations," and article 13 limits the power of the General Assembly to "initiate studies and make recommendations" regarding the promotion of international cooperation in areas such as economics and human rights. *Id.* arts. 13(b), 62.

4. U.N. CHARTER art. 1, ¶ 3.

Comment suggests that the Charter's historical context and the drafters' intent justify a broad interpretation of the sanctioning power and that this interpretation is consistent with a primary purpose of the Charter, the maintenance of peace and security. It concludes that the Council's power is limited, but not as the direct result of customary human rights law. This Comment suggests that these limits are due to rules of statutory interpretation and the implications of subsequent actions of the United Nations.

## II. THE UNITED NATIONS CHARTER

The United Nations Charter is an agreement among nations that creates a multipurpose organization known as the United Nations.<sup>5</sup> The Charter creates six principal organs, and provides for the establishment of any necessary subsidiary organs.<sup>6</sup> The principal organs are the General Assembly,<sup>7</sup> the Security Council,<sup>8</sup> the Economic and Social Council,<sup>9</sup> the Trusteeship Council,<sup>10</sup> the International Court of Justice,<sup>11</sup> and the Secretariat.<sup>12</sup> The Charter defines each organ's powers and functions in great detail. It does not, however, empower the United Nations to operate as a government.<sup>13</sup>

The Charter offers membership in the United Nations to all "peaceloving states which accept the obligations contained in the . . . Charter."<sup>14</sup> It obligates each member nation to settle disputes peacefully, and to refrain from the use of, or the threat of, force. Member nations are also required to assist the United Nations in actions taken in accordance with the Charter, and to refrain from assisting states against which the United Nations is taking action.<sup>15</sup> Members that violate Charter principles may have their memberships, or at least the privileges of their memberships, withdrawn.<sup>16</sup>

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5. U.N. CHARTER; LELAND M. GOODRICH, *THE UNITED NATIONS* 28-29 (1959).

6. U.N. CHARTER art. 7, ¶ 1; GOODRICH, *supra* note 5, at 32.

7. U.N. CHARTER arts. 9-22.

8. *Id.* arts. 23-32.

9. *Id.* arts. 61-72.

10. *Id.* arts. 86-91.

11. *Id.* arts. 92-96.

12. *Id.* arts. 97-101.

13. GOODRICH, *supra* note 5, at 27. The United Nations is not intended to be the "government" of the world; that is, it is not designed to govern the governments of the individual nations. *Id.*

14. U.N. CHARTER art. 4, ¶ 1.

15. *Id.* art. 2.

16. *Id.* art. 6.

### A. *Historical Influences, the Structure of Power, and the Intent of the Drafters*

History and recent events dominated the atmosphere of the San Francisco Conference ("Conference"), and heavily influenced the drafters' decisions during the Charter's creation. The drafters' desire to avoid future wars prompted the establishment of a strong decision-making body. Indeed, the power structure created in the Charter, and the language defining that power, reflect a paramount desire to create a powerful peace-keeping organization.

#### 1. Historical Influences

The memories of two world wars, culminating in the Nazi atrocities, lay in the hearts and minds of the delegates at the Conference.<sup>17</sup> With these memories as their catalyst, the delegates sought to "prevent the repetition of a new tragedy . . . to make impossible the occurrence of a new aggression and a new war."<sup>18</sup> Indeed, the sole objective of the Conference was to "provide the machinery which [would] make future peace not only possible but certain,"<sup>19</sup> for the members believed that, without security, life itself was at stake.<sup>20</sup>

The necessity and fear that gave birth to the United Nations greatly influenced the power structure created by the delegates.<sup>21</sup> To avoid the same failure as the Covenant of the League of Nations,<sup>22</sup> the delegates vested central decision-making powers in the Council and

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17. President Truman's speech in the opening session of the Conference evidences this mindset, as he reminded the delegates that they had "lived through the torture and the tragedy of two world conflicts . . . ." *Opening Session*, *supra* note 2, at 6. See also GOODRICH, *supra* note 5, at 320 ("The world had been shocked by the Nazi treatment of racial, religious, and national minority groups before and during the war.").

18. MAURICE WATERS, *From Dreams to Reality*, in THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND ADMINISTRATION 15 (1967) (quoting U.S.S.R. Ambassador Andrei Gromyko).

19. *Opening Session*, *supra* note 2, at 7 (quoting President Harry S. Truman).

20. *Speech in the Opening Debate*, Doc. 8, 1 U.N.C.I.O. Docs. 552 (1945).

21. WATERS, *supra* note 18, at 14.

22. The League of Nations ("League"), like the United Nations, was formed at the conclusion of a tragic war. GOODRICH, *supra* note 5, at 8. It was established by the League of Nations Covenant ("Covenant") as an organization comprised of three main organs: the Assembly, the Council, and the Secretariat. LEAGUE OF NATIONS COVENANT; GOODRICH, *supra* note 5, at 12-13. The Covenant also established a Permanent Court of International Justice. LEAGUE OF NATIONS COVENANT; GOODRICH, *supra* note 5, at 13. Even non-members of the League, such as the United States, could join this court. LEAGUE OF NATIONS COVENANT; GOODRICH, *supra* note 5, at 13.

The primary purpose of the League was to maintain peace. GOODRICH, *supra* note 5, at

clearly defined the functions and powers of the other organs.<sup>23</sup> In doing so, the delegates rejected a suggestion to subordinate the Council's power to the General Assembly by refusing to require the Council to exercise its powers "under the authority" of the General Assembly.<sup>24</sup> This structure of independent executive power, motivated by the desire to create a stronger system to ensure "prompt and effective action by the United Nations . . . for the maintenance of international peace and security," supports the conclusion that the drafters intended the Council's powers to be broad.<sup>25</sup>

## 2. Powers of the Security Council

The functions and powers of the Council are defined by the Charter. Article 24 "confer[s] on the Security Council primary responsibility for the maintenance of international peace and security."<sup>26</sup> To allow the Council to fulfill this primary responsibility, the Charter also vests the Council with peace-keeping powers.<sup>27</sup>

Chapter VII of the Charter authorizes the Council to counteract threats to peace, breaches of peace, and acts of aggression.<sup>28</sup> Article

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10. Nonetheless, recognizing the importance of favorable economic, social, and political conditions in the pursuit of peace, the founders also sought international cooperation. *Id.*

The demise of the League was based, in part, upon its failure to grant the Assembly or Council any effective means of coordinating the actions of its members. LELAND M. GOODRICH, *The UN Security Council, in THE UNITED NATIONS: PAST, PRESENT, AND FUTURE* 18 (1972) [hereinafter GOODRICH, UN SECURITY COUNCIL]. The Covenant limited the Council's power to making recommendations, and relied on its member states to enforce the collective security by applying economic sanctions against violating states. *Id.* The members' obligations to institute military measures to enforce peace were merely moral. *Id.*

23. U.N. CHARTER arts. 24, 41; GOODRICH ET AL., *supra* note 1, at 311.

24. GOODRICH, UN SECURITY COUNCIL, *supra* note 22, at 25. Under article 11 of the Charter, the General Assembly's power is limited to considering and making recommendations with respect to general principles relating to the maintenance of peace and security. U.N. CHARTER art. 11. Article 24 of the Charter vests the Council with "primary" responsibility for the maintenance of peace and security. *Id.* art. 24.

Article 12 of the Charter specifically prohibits the Assembly from making "any recommendation with regard to [a] dispute or situation" while the Council is exercising its functions under the Charter, unless the Council so requests. *Id.* art. 12, ¶ 1. Further, article 11 requires the Assembly to refer to the Council "any such question on which action is necessary." *Id.* art. 11, ¶ 2.

25. U.N. CHARTER art. 24, ¶ 1.

26. *Id.* art. 24.

27. *Id.* arts. 39-51.

28. *Id.* art. 39. The drafters intentionally did not define or describe what constitutes aggression, although various proposals were offered. The drafters feared that an established definition or formula would be over- or under-inclusive, sometimes resulting in inappropriate or premature United Nations enforcement measures. CHARTER OF THE UNITED NATIONS: REPORTS TO THE PRESIDENT 91-92 (1969) [hereinafter REPORTS].

42 affirmatively vests the Council with the power to "take such action . . . as may be necessary to *maintain or restore international peace and security*."<sup>29</sup> To invoke its article 42 powers, the Council need only "consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate."<sup>30</sup> Therefore, while article 41 outlines a non-exhaustive list of *non-force* measures available to the Council, such as the interruption of economic relations,<sup>31</sup> article 42 increases the Council's power to allow the use of force, including blockades.<sup>32</sup> Similar to article 41, article 42's enumerated list of forceful measures is not exclusive.<sup>33</sup>

The Charter's power originates from the governments of the respective signatory nations<sup>34</sup> through representatives who accepted the

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29. U.N. CHARTER art. 42 (emphasis added). In its entirety, article 42 reads as follows: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations.

*Id.*

30. *Id.*

31. U.N. CHARTER art. 41. "These [non-force measures] may include the complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*; see also GOODRICH ET AL., *supra* note 1, at 311-12.

32. U.N. CHARTER art. 42.

33. GOODRICH ET AL., *supra* note 1, at 315.

34. GOODRICH, *supra* note 5, at 62. "The Charter is an agreement between states. . . . [T]he Organization rests on the consent of its Members." *Id.* The 51 original signatories to the Charter are as follows: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian SSR, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, South Africa, Syria, Turkey, Ukrainian SSR, United Kingdom, United States, Uruguay, USSR, Venezuela, and Yugoslavia. China was represented in the United Nations by the government of the Republic of China until October 25, 1971. Since then, China has been represented by the government of the People's Republic of China. The Republic of China is no longer a member of the United Nations and has no representation.

There are 108 non-signatory nations admitted under article 4, which offers membership to all "peaceloving states which accept the obligations contained in the present Charter." They are: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Botswana, Brunei, Bulgaria, Burma, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cyprus, Djibouti, Dominica, Equatorial Guinea, Fiji, Finland, Gabon, Gambia, Germany (East), Germany (West), Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kampuchea, Kenya, Kuwait, Laos, Lesotho, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mongolia, Morocco, Mozambique, Nepal, Niger, Nigeria, Oman, Pakistan, Papua,

Charter in its current form."<sup>35</sup> The acceptance by member nations validates the Council's article 42 powers, as they are an integral component of the Charter. Further validation of the Council's powers is found in article 25, which declares that "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council . . . ."<sup>36</sup>

### *a. Plain Language of the Charter*

The Charter's plain language vests enormous power in the Council to respond to threats, breaches of peace, and acts of aggression. Article 42 indicates that the Council's power is limited to that which is "necessary" to maintain or restore peace and security.<sup>37</sup> Therefore, the Council may employ any and all measures as may be necessary,<sup>38</sup> including force, until peace is restored and no longer threatened. Further, article 39 indicates that the Council *must* take action: "The Security Council . . . *shall* make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore . . . peace and security," once the Council "determine[s] the existence of any threat to . . . [or] breach of the peace, or act of aggression."<sup>39</sup> Thus, the plain language of the Charter not only grants the Council broad powers, but demands that the Council take action.

## 3. The Drafters' Intent

The broad language of chapter VII creates a potential conflict because the Council's exercise of its enforcement powers may contravene Charter provisions fostering goals other than the maintenance of peace and security. This raises questions as to which purpose should

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Portugal, Qatar, Romania, Rwanda, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, Spain, Sri Lanka, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Tanzania, Thailand, Togo, Trinidad, Tunisia, Uganda, United Arab Emirates, Upper Volta, Vanuatu, Vietnam, Yemen, Yemen (Democratic), Zaire, Zambia, and Zimbabwe. U.N. CHARTER art. 4, ¶ 1; BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 894-95 (2d ed. 1990).

35. See U.N. CHARTER pmbl.

36. *Id.* art. 25.

37. *Id.* art. 42. The Council "may take such action . . . as may be *necessary* to maintain or restore international peace and security." *Id.* (emphasis added).

38. *Id.* The power to determine what is "necessary" is a power vested solely in the Security Council: "Any such question on which action is necessary shall be referred to the Security Council." U.N. CHARTER art. 11, ¶ 2.

39. *Id.* art. 39 (emphasis added).

prevail in the case of conflict. Specifically, which purpose prevails if by exercising its sanctioning powers to promote the maintenance of peace and security, the Council simultaneously violates the human rights of those it is sanctioning? Perhaps the most pointed and direct answer is reflected in the Chairman of the Coordination Committee's statement during the Committee's twenty-first meeting.<sup>40</sup> Chairman Leo Pasvolksy of the United States stated:

[T]he sole purpose of the Organization is the maintenance of peace and security, which is not to be confused with the objectives or principles covered by other articles. Article 1 is governed by the words "to maintain peace and security" and envisages a breach of the peace as the final point of danger.<sup>41</sup>

Indeed, all who participated in the organization of the United Nations agreed with this view.<sup>42</sup>

The drafters of the Charter set forth its purposes in both the preamble and article 1.<sup>43</sup> Although the preamble is not clearly distinguishable from article 1, it is considered an expression of the drafters' common intentions, embodying the member nations' motivation for forming the United Nations.<sup>44</sup> In comparison, article 1 sets forth the common ends upon which the drafters agreed; that is, the purposes to

40. *Documents of the Coordination Committee*, Doc. 5180, 17 U.N.C.I.O. Docs. 139-40 (1954) [hereinafter *Documents of the Coordination Committee*].

41. *Id.* Although the Charter's language indicates that the maintenance of peace and security was not the United Nation's *sole* purpose, Mr. Pasvolksy's comment clearly indicates that it was the purpose that most strongly motivated the Conference delegates.

42. GOODRICH, *supra* note 5, at 41. "Though the United Nations was initially conceived as an organization with a number of purposes, all who participated in its establishment were agreed that its primary purpose—the purpose which must be achieved if other purposes were to be attained—was the maintenance of international peace and security." *Id.*

43. U.N. CHARTER pmbl., art. 1.

44. GOODRICH ET AL., *supra* note 1, at 20. The preamble states:

**WE THE PEOPLES OF THE UNITED NATIONS DETERMINED**

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom.

**AND FOR THESE ENDS**



which the member nations ultimately subscribed.<sup>45</sup> Article 1 enumerates four distinct purposes, the ordering of which is instructive, as it graphically displays the drafters' intent to raise the goal of maintaining peace and security above all others.<sup>46</sup> Paragraph one states, as the first of the United Nations' purposes, "[t]o maintain international peace and security, and . . . to take effective collective measures" to achieve that end.<sup>47</sup> This purpose is reinforced by the preamble's initial sentence, which embodies the drafters' desire to "save succeeding generations from the scourge of war."<sup>48</sup> Subsequent to the purpose of maintaining peace and security, the drafters addressed the issue of human rights. In paragraph three, article 1 declares the member nations' desire to achieve international cooperation in the promotion of human rights.<sup>49</sup> This purpose is supported by the preamble's statement of the drafters' desire "to reaffirm faith in fundamental human

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to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples.

**HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS**

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

U.N. CHARTER pmbl.

45. GOODRICH ET AL., *supra* note 1, at 20.

46. See U.N. CHARTER art. 1. Article 1 states:

*Article 1. The Purposes of the United Nations are:*

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(4) To be a centre for harmonizing the actions of nations in the attainment of these common ends.

*Id.* art. 1, §§ 1-4.

47. *Id.* art. 1, § 1.

48. *Id.* at pmbl.

49. *Id.* art. 1, § 3.

rights.”<sup>50</sup>

The drafters’ ordering of these purposes, in conjunction with the Charter provisions, demonstrates the primary significance of preserving peace.<sup>51</sup> The drafters thus emphasized their concern for the maintenance of peace and security by addressing these issues in both the preamble and article 1, and by addressing human rights concerns only *after* addressing peace and security.<sup>52</sup>

The drafters’ choice of words also indicates a more guided purpose regarding peace and security, as article 1 expressly provides collective measures to prevent and remove threats to peace and to suppress aggression.<sup>53</sup> Further, the drafters specifically rejected a proposed amendment to article 1 that would have required “collective measures [to] be taken in accordance with international law and justice,”<sup>54</sup> because it would have “tie[d] the hands of the Security Council to an undesirable extent.”<sup>55</sup> This refusal implies the primacy of the peace function.

In contrast, the Charter’s language fails to illustrate the drafters’ goal of protecting human rights. Because the drafters did not intend to vest the United Nations with governmental powers to address economic and social problems,<sup>56</sup> the Charter does not secure human rights. Rather, it seeks only to obtain international cooperation in “promoting and encouraging respect for human rights.”<sup>57</sup> Even article 56, which demands a pledge from members to “co-operate[] with the Organization for the achievement of the purposes set forth in Article 55,” requires very little of member nations in light of article 55, which merely states that the United Nations “shall promote” certain goals.<sup>58</sup> Article 55 not only fails to define what constitutes acceptable standards for members to meet with respect to these goals, it fails to define what constitutes acceptable cooperation. Thus, even the pledge in article 55 reflects little more than the desire to *promote* cooperation

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50. *Id.* pmbl.

51. GOODRICH ET AL., *supra* note 1, at 25-26.

52. See U.N. CHARTER art. 1, ¶¶ 1-4; GOODRICH ET AL., *supra* note 1, at 25.

53. U.N. CHARTER art. 1, ¶ 1.

54. GOODRICH ET AL., *supra* note 1, at 27-28.

55. *Id.* at 28.

56. GOODRICH, *supra* note 5, at 27.

57. U.N. CHARTER art. 1, ¶ 3.

58. *Id.* arts. 55, 56. Article 55 of the Charter reads as follows:

*Article 55.* With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on re-

between nations to solve common problems.<sup>59</sup> This idea is further supported by the fact that article 2 of the Charter expressly denies the United Nations authority "to intervene in matters . . . essentially within the domestic jurisdiction of any state," unless the matter becomes an international concern.<sup>60</sup>

One may argue that subsequent conventions and treaties have elevated human rights to an international concern, placing human rights within the purview of the United Nations.<sup>61</sup> Nonetheless, the drafters' refusal to amend article 1 to restrict collective measures to those taken in accordance with international law<sup>62</sup> substantiates the fact that all other purposes in the Charter are subordinate to the drafters' primary concern of maintaining peace and security, because human rights law is subsumed by international law. Further, the strong language of chapter VII, empowering the Council,<sup>63</sup> supports an interpretation that the Charter vests broad enforcement powers in the Council to effectuate the promotion of peace.<sup>64</sup>

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spect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.* art. 55.

59. GOODRICH ET AL., *supra* note 1, at 35.

60. U.N. CHARTER art. 2, ¶ 7. It is difficult to determine when a matter becomes an international concern, and whether a violation has occurred upon which the United Nations can act. Indeed, even if a precise line could be drawn, political circumstances could cause it to change at any time. JAMES F. GREEN, UNITED NATIONS AND HUMAN RIGHTS 662 (1956).

61. See, e.g., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72 (1984) [hereinafter *Convention Against Torture*]; *International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/786 (1979); *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) [hereinafter *Covenant on Civil and Political Rights*]; *Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess., U.N. Doc. A/236 (1946) [hereinafter *Nuremberg*].

62. GOODRICH ET AL., *supra* note 1, at 27-28.

63. U.N. CHARTER arts. 39-51.

64. This is not to suggest, however, that blind violations of human rights are a natural consequence of this conclusion.

### III. POSSIBLE LIMITATIONS ON THE POWER OF THE SECURITY COUNCIL

The Charter's structure and language reflect the drafters' intent to create a strong peace-keeping organization. However, outside factors may guide the interpretation of the Charter, such that its broad language may be limited in its application. Statutory rules of construction, subsequent actions of the United Nations, and prevailing international law all potentially limit the meaning of the Charter's language.

#### A. *Governing Rules of Interpretation*

According to rules of statutory construction, the greatest limit on a provision is often other provisions within the same instrument. Generally, a document is construed and assumed to be internally consistent.<sup>65</sup> Seemingly conflicting provisions are interpreted in a manner that preserves the instrument as a whole, and does not render any one provision meaningless.<sup>66</sup> Therefore, the Charter's enforcement provision, which supports one of its purposes and conflicts with others, must be construed so as to allow all Charter purposes to co-exist.<sup>67</sup> Accordingly, the human rights provisions of articles 1 and 55 must limit the broad enforcement language of chapter VII.<sup>68</sup> Despite the drafters' intent to prevent war and ensure peace, the human rights provisions must also be given meaning.

The proposition that the United Nations must enforce the Charter's human rights provisions finds support in the opening speech of Norway's Minister of Foreign Affairs, Trygve Lie, at the Charter Conference.<sup>69</sup> Lie, later elected Secretary-General, addressed the Charter's multiplicity of purposes.<sup>70</sup> While acknowledging the importance of achieving peace, Lie encouraged the Conference to include the preservation of human rights as one of its concerns.<sup>71</sup> Lie's statement that "[d]aily bread turns to stone unless eaten in freedom and

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65. SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (Dallas C. Sands ed., 4th ed. 1984).

66. *Id.* § 46.06.

67. *Id.* "The construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." *Id.*

68. U.N. CHARTER arts. 1, 39-51, 55.

69. *Speech in the Opening Debate, supra* note 20, at 27.

70. *Id.*

71. According to Lie, "All the members of the United Nations are bound together . . . by their vital interest[] in protection against aggression." *Id.*

with human dignity" illuminates the essence and importance of these two purposes.<sup>72</sup>

Thus, interpreting any Charter provision in light of the others limits the interpretation of that one provision.<sup>73</sup> Therefore, the human rights provisions of the Charter must narrow the otherwise broad powers vested in the Council by chapter VII.

### *B. Subsequent Actions of the United Nations*

Other potential limitations on chapter VII's broad enforcement language are the subsequent actions and decisions of the United Nations. Although the United Nations initially found it difficult to implement the Charter's human rights provisions, subsequent United Nations resolutions gave substance to these vague provisions.

At the time of the Charter's drafting, the concept of global human rights was relatively new. Indeed, the drafters failed to agree upon a definition of "human rights" and, as such, the term remains undefined in the Charter.<sup>74</sup>

Early international resolutions, "couched in very general terms," offered hope that an agreement would be reached in the area of global human rights,<sup>75</sup> but subsequent attempts to apply these basic human rights principles revealed a split between communist and democratic countries, and between developed and underdeveloped countries.<sup>76</sup> For example, many controversies arose "over the nature of the powers and functions of the United Nations organs and the extent to which the United Nations [could] act without violating the domestic jurisdiction clause in Article 2(7) of the Charter."<sup>77</sup> Consequently, implementation of the Charter's human rights provisions has proven difficult.

Despite these difficulties, the United Nations' efforts to promote human rights help define the nature and extent of the limitations that the Charter's human rights provisions place on other Charter provisions.<sup>78</sup> In fact, the United Nations' efforts to translate the general

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72. *Id.* at 28.

73. SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 65, § 46.05. The purposes that motivate a lawmaker to write a particular enactment pose "an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms." *Id.*

74. GREEN, *supra* note 60, at 643.

75. *Id.*

76. *Id.*

77. *Id.* at 645.

78. See, e.g., *International Covenant on Economic, Social and Cultural Rights*, G.A. Res.

goals of human rights into precise language resulted in the Universal Declaration of Human Rights,<sup>79</sup> the International Covenant on Civil and Political Rights,<sup>80</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>81</sup> These documents give substance to the Charter's human rights provisions, and lend credibility to their presence in the Charter.<sup>82</sup>

In addition, some actions taken by the United Nations are instructive as to potential limits on the Council's chapter VII powers. For example, the fact that the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights, focuses on individual rights, rather than state rights,<sup>83</sup> and the existence of resolutions against torture and genocide,<sup>84</sup> suggest that the Council may be precluded from employing its enormous powers on one individual to effect its goal of maintaining peace and security.<sup>85</sup> This concept is amplified by the United Nations' formal recognition of the principles underlying the Nuremberg Tribunal's condemnation of Nazi war criminals.<sup>86</sup> Such recognition

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2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) [hereinafter *Covenant on Economic, Social and Cultural Rights*]; *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; and *Nuremberg*, *supra* note 61.

79. *Universal Declaration*, *supra* note 78.

80. *Covenant on Civil and Political Rights*, *supra* note 61.

81. *Covenant on Economic, Social and Cultural Rights*, *supra* note 78; GREEN, *supra* note 60, at 708. The Universal Declaration of Human Rights is generally understood to set forth goals and standards for governments, while the two covenants define the rights of individuals as subjects of international law. *Id.* at 663.

82. The credibility of the Charter's human rights provisions is questionable in light of rules of statutory interpretation, the Charter's plain language, and the drafters' intent. Because no definitions are included in the Charter, and because the Charter only "encourages" members to promote human rights, the Charter affords little assistance to one attempting to glean the meaning of the human rights provisions. Further, it is difficult to ascertain the parameters that the human rights provisions place on the Council's enforcement powers, because the weight of these provisions, relative to the Council's enforcement powers, is unclear. The problem is further exacerbated by evidence of the drafters' intent, which supports the proposition that maintaining peace and security preempts all other goals.

83. *Covenant on Economic, Social and Cultural Rights*, *supra* note 78; *Covenant on Civil and Political Rights*, *supra* note 61; GREEN, *supra* note 60, at 663.

84. See, e.g., *Convention Against Torture*, *supra* note 61.

85. For example, assume that during the 1990 Gulf War the Security Council authorized the kidnapping and torture of Saddam Hussein's mother. Although the action would be an attempt to restore world peace and suppress Hussein's aggression, it would certainly constitute outrageous conduct, despite the Council's ability to "decide what measures not involving the use of armed forces are to be employed to give effect to [their] decision[s]." U.N. CHARTER art. 40.

86. *Nuremberg*, *supra* note 61. "[The war criminals] were convicted for political, racial,

may limit the Council's power, suggesting that the Council cannot exercise its power to determine that a particular state, individual, or group of people poses a threat to the peace, if politics, religion, or race are the exclusive criterion.<sup>87</sup> Accordingly, the Council may be constrained from authorizing force or sanctions against a nation that it determines to be a threat to peace, if such determination is based solely on these factors.<sup>88</sup> This does not suggest, however, that the Council cannot meet an actual threat to peace with responsive force in an effort to debilitate an aggressive state. Rather, the goals of peace and security can be achieved through such means, so long as they are not motivated by politics, race, or religion.

The Charter authorizes the Council to escalate force only after less forceful measures have proven ineffective.<sup>89</sup> However, it is unclear whether such escalated military strategies employed to debilitate an aggressive nation would be considered outrageous and abusive if they endangered civilian populations.<sup>90</sup> Moreover, it is unclear whether the authorization of biological, chemical, or nuclear warfare lies beyond the Council's power when the survival of the world is at risk. These warfare techniques may be permissible, so long as they are initiated and executed in an attempt to gain control over aggression that threatens human existence.<sup>91</sup>

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and religious persecutions committed against any civilian population." HUMAN RIGHTS IN THE WORLD COMMUNITY 46 (Richard P. Claude & Burns H. Weston eds., 1989).

87. U.N. CHARTER art. 39. Once the Council determines that a threat to peace exists, it may take action under articles 41 and 42, and employ force to maintain peace. This scenario closely parallels the rationale employed by the Nazis to reach their desired end. The Nuremberg trials "were a protest against the erasure of the individual as a subject, mediate or immediate, of international law." HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 86, at 46.

88. This would be a scenario in which the United Nations utilizes its power under article 39, and determines that a particular state or group of people is threatening world peace merely because of its views or practices. This scenario assumes that no true aggression or breach of the peace was committed, but merely that a threat to peace exists. Additionally, the determination, based on these factors, that a threat exists is suspect.

89. U.N. CHARTER art. 42.

90. An example is the total blockade of an aggressive state.

91. Due to the existence of the United Nations documents prohibiting the use of genocide, and chemical and nuclear warfare, this use of force is envisioned only in extremely rare situations. Nonetheless, "rare" is certainly not the equivalent of "never." Indeed, as technology advances, the perpetration of mass destruction falls within the power of every human being. For example, it is conceivable that a homogeneous society could infect its population with biological contagions only destructive to other cultures and races. Thus, one nation would become a threat to the lives of millions outside of its culture. In this scenario, the security of the entire world must preempt that of one nation, which, by its very actions, aggressed against the world. Consequently, extreme force, such as nuclear and chemical warfare,

Thus, although the limits on the Council's power are not clearly defined, the Council's power may extend to biological, chemical, and nuclear warfare, if the severity of the situation necessitates such force. These types of actions may provide an outermost limit. Thus far, the Council has never approached this limit, but has conservatively exercised its powers.

### C. *International Human Rights Law*

The final potential limitation on the Council's chapter VII powers is prevailing international law. Specifically, international human rights law may limit the counteractive measures the Council can invoke to restore or maintain international peace and security.

#### 1. Defining Human Rights Provisions in the Charter

To achieve world peace and security, the drafters of the Charter acknowledged that international economic and social conditions conducive to peace had to be established.<sup>92</sup> The social conditions envisioned by the drafters included the establishment of human rights and fundamental freedoms for all.<sup>93</sup> In fact, many articles in the Charter vest specific powers in the United Nations organs to aid in the pursuit of this goal. Nonetheless, the human rights articles are vague, and they lack the forcefulness of the chapter VII articles empowering the Council.

The drafters first attempted to create a human rights document in the form of a bill of rights.<sup>94</sup> Although it was never completed due to numerous difficulties,<sup>95</sup> this bill provided the basis for the Universal

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must be within the authority of the United Nations; otherwise, human rights for the rest of the world would be non-existent.

92. RUSSELL, *supra* note 2, at 303.

93. *Id.*; GOODRICH ET AL., *supra* note 1, at 244.

94. RUSSELL, *supra* note 2, at 323.

95. The majority of this bill of rights contained uncontroverted traditional provisions, such as guarantees of equality in the law with respect to life, liberty, and property. *Id.* at 324. However, dissension arose with respect to the content of some provisions. For example, an economic welfare provision, which emphasized "freedom from want," was criticized as too broad to be expressed as a guarantee. *Id.* at 325. Additionally, the United States opposed another generalized provision that guaranteed the right to public education, because it conflicted with the United States concept of separation of church and state. *Id.*

Probably the most difficult problem associated with this bill of rights was the issue of enforceability: "Without effective sanctions, a bill of rights could not be made binding on all states." *Id.* at 326. Indeed, the enforceability issue proved difficult in many respects. If the enforcement system allowed review by an international court, it was doubtful that states would accept the jurisdiction of an international court over their citizens, especially in matters di-



Declaration of Human Rights ("Universal Declaration").<sup>96</sup> Initially, some drafters wanted to incorporate the Universal Declaration into the Charter. However, the drafters rejected this idea for three reasons: 1) the Universal Declaration failed to harmonize with the Charter's articles;<sup>97</sup> 2) some drafters feared that only the uncontroverted traditional provisions, such as equality before the law with respect to life, liberty, and property, would be accepted by all of the member nations;<sup>98</sup> and 3) the drafters anticipated enforcement problems with the Universal Declaration.<sup>99</sup>

Despite their inability to incorporate the Universal Declaration into the Charter, the drafters emphasized the importance of the Charter's human rights provisions by placing the provisions "prominently in the first Chapter among the purposes of the Organization."<sup>100</sup> Indeed, article 1 lists the promotion and encouragement of human rights and fundamental freedoms "without distinction to race, sex, language, or religion" as one of its purposes.<sup>101</sup>

Although the Charter declares the promotion of human rights as one of its purposes, the drafters failed to define or enumerate what constitutes "human rights and fundamental freedoms."<sup>102</sup> Instead, the drafters intended that the United Nations would later define human rights,<sup>103</sup> and, to this end, the drafters granted broad powers to the General Assembly and to the Economic and Social Council.<sup>104</sup> For example, article 13 grants the General Assembly broad authority to "initiate studies and make recommendations" to promote international cooperation in the economic and social fields, and to assist the realization of human rights and fundamental freedoms.<sup>105</sup> Article 62,

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rectly against a state. *Id.* The same problem would arise even if enforcement was attempted by a less formal tribunal, such as a commission on human rights. *Id.* Finally, voluntary enforcement by a violating state was absurd if that state was deliberately infringing the rights guaranteed by the bill.

The subcommittee working on the bill of rights failed to resolve these problems. *Id.* at 327. In fact, suspension of committee activity in the summer of 1943 halted all work on the bill of rights and on these problems. *Id.*

96. *Universal Declaration*, *supra* note 78; RUSSELL, *supra* note 2, at 327.

97. RUSSELL, *supra* note 2, at 327.

98. *Id.* at 328. Consequently, subsequent expansion of the basic provisions would require a formal amendment to the Charter, which would prove too difficult.

99. *Id.*; see also *supra* note 95 and accompanying text.

100. REPORTS, *supra* note 28, at 38.

101. U.N. CHARTER art. 1, ¶ 3.

102. REPORTS, *supra* note 28, at 38; GOODRICH ET AL., *supra* note 1, at 247.

103. GOODRICH ET AL., *supra* note 1, at 247.

104. See U.N. CHARTER arts. 9-22, 61-72.

105. *Id.* art. 13, ¶ 1(b).

like article 13, grants the Economic and Social Council the power to "make or initiate studies and reports with respect to international economic [and] social . . . matters."<sup>106</sup> The Economic and Social Council can also "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all,"<sup>107</sup> and must establish commissions to promote these human rights and freedoms.<sup>108</sup>

In addition to the powers granted to the General Assembly and the Economic and Social Council, the Charter places obligations on both the United Nations and on its individual member nations. For example, article 55 provides that the United Nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms,"<sup>109</sup> and article 56 requires that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."<sup>110</sup> Once again, however, the Charter requires only general pledges and obligations, with no specific guidelines.

The Charter neither affirmatively grants any organ of the United Nations the power to enforce the Charter's human rights provisions, nor sets forth specific United Nations actions that will ensure the promotion of human rights. Rather, the Charter grants only vague powers to the organs of the United Nations, as the drafters intended that its objectives would be defined and fulfilled in the future. Therefore, the drafters employed such loose terms as "promote," "encourage," and "assist," when describing the duties of the United Nations' organs, and avoided such terms as "protect," "safeguard," and "guarantee."<sup>111</sup> Thus, the actual Charter provisions provide little or no guidance to deciphering the drafters' intended limits on the Council in the exercise of its enforcement powers. Rather, "under the impact of the war the major interest . . . was . . . in creating an international organization which would be effective in maintaining international peace and security . . . ."<sup>112</sup> The drafters' words indicate that the

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106. *Id.* art. 62, ¶ 1.

107. *Id.* art. 62, ¶ 2.

108. *Id.* art. 68. According to article 68, "The Economic and Social Council *shall* set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." U.N. CHARTER art. 68 (emphasis added).

109. *Id.* art. 55(c).

110. *Id.* art. 56.

111. GOODRICH ET AL., *supra* note 1, at 247.

112. *Id.* at 245.

emphasis was on "making international police action effective," not on securing human rights.<sup>113</sup>

## 2. Customary Law

The Council's power may be further limited by customary law<sup>114</sup> due to its recognition as international law.<sup>115</sup> Additionally, the Council's power may be limited by a basic principle of treaty law dictating that international agreements, such as the Charter, must "be interpreted in the light of the rules of customary international law."<sup>116</sup> Generally, international law is drawn from explicit international agreements, such as treaties, conventions, protocols, pacts, and accords. Customary law differs from these types of explicit agreements, in that it is implicit by nature. Customary law evolves from "certain maxims . . . consecrated by long use, and observed by nations in their mutual intercourse."<sup>117</sup>

Explicit international agreements are binding contracts among nations that often create legal rights and duties obligating the signatories to certain conduct.<sup>118</sup> In general, such agreements are considered legally binding because "they have been concluded by sovereign states consenting to be bound."<sup>119</sup> However, multiple international agreements with similar general provisions may generate customary law—rules applicable even to non-signatory nations.<sup>120</sup> "[S]tates in and by their international practice may implicitly consent to creation and application of international legal rules."<sup>121</sup>

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113. *Id.*

114. Customary law is a set of customs, each of which imposes an obligation, right, or entitlement on a nation. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1113-14 (1982).

115. See generally MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-41 (1988); JAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1-14 (1990).

116. JANIS, *supra* note 115, at 11. In addition, commentators claim that some customary law, such as that on torture, has acquired the status of *jus cogen*, a preemptory norm that cannot be avoided, even by treaty. *Id.*

117. *Id.* at 36.

118. *Id.* at 9.

119. *Id.* at 10.

120. D'Amato, *supra* note 114, at 1129.

121. JANIS, *supra* note 115, at 36. Difficulties may arise when implied rules, less definite in their formation and usually subject to doubt in practice, have the potential to regulate states without a treaty creating explicit obligations. *Id.* at 35-36. These types of rules create the body of "customary international law." *Id.*

### 3. Customary Human Rights Law and the Security Council

Before obligations arising from treaties or conventions can bind non-signatories, the obligations must acquire the status of customary law.<sup>122</sup> As discussed above, customary law may evolve from international agreements,<sup>123</sup> and some commentators suggest that the conventions themselves “constitute or generate customary rules of law” by virtue of their generalized provisions.<sup>124</sup> Proponents of this theory note that they have not located a “single instance of a generalizable treaty provision . . . *not* be[ing] transmuted into customary law.”<sup>125</sup> These commentators argue that nations have “manifested by virtue of their behavior over the centuries that generalizable provisions in treaties become part of customary law directly.”<sup>126</sup> This theory clearly supports the argument that provisions in the Universal Declaration<sup>127</sup> have become customary international law.<sup>128</sup>

A second source of customary international law emanates from actual state practice.<sup>129</sup> Even the ancient law of Rome acknowledged an “[u]nwritten law consist[ing] of rules approved by usage for long-continued custom approved by the consent of those who use it imitates a statute.”<sup>130</sup> Under this theory, each state is considered both a subject of international law and a legislator.<sup>131</sup> States are subjects of international law because their actions can be evaluated under existing international legal rules.<sup>132</sup> If state actions fail to conform to

122. BROWNLIE, *supra* note 115, at 11; Arthur Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 44 (1988). Since customary law ultimately rests on the consent of nations, no nation is legally bound to pronouncements by others. *Id.*

123. See D'Amato, *supra* note 114, at 1129.

124. *Id.* at 1129, 1131. “Generalized provisions” are those provisions universally applicable to every nation, without exception. *Id.* at 1131. For example, prohibitions against slavery, torture, and genocide could be universally applied, and need not be limited to the parties of a treaty. This differs greatly from treaty provisions affecting concerns particular to the parties, such as land titles, rights of water passage, and boundaries. In these latter instances, the provisions apply specifically to an agreement between the parties and cannot be generalized to a rule affecting all nations. *Id.* at 1131 n.83.

125. *Id.* at 1132 (emphasis in original).

126. *Id.* at 1133.

127. *Universal Declaration*, *supra* note 78.

128. Although the Universal Declaration of Human Rights is not a treaty, it contains generalizable provisions, and therefore can be considered customary international law.

129. JANIS, *supra* note 115, at 35-36; see also *supra* text accompanying note 121.

130. *Id.* at 35 (quoting THE INSTITUTES OF JUSTINIAN, THE ELEMENTS OF ROMAN LAW 45 (1956)).

131. Weisburd, *supra* note 122, at 31.

132. *Id.*

existing international rules, the actions may change the international rules because the actions are the "seeds of a new rule."<sup>133</sup> In this respect, state actions carry a legislative power. Consequently, one source of customary international law is state practice.

Various sovereign activities constitute state practice. Treaties between states, orders from governments to military officers, orders given by military officers, decisions of national courts, conventions, and decisions by domestic courts have all been recognized as constituting state practice.<sup>134</sup> To this list, of course, one could add national legislation and administration, as well as treaties and conventions. Indeed, state practice, motivated by a belief in its legally obligatory nature, provides a consistent theory of sources of customary international law.<sup>135</sup>

When state practices directly contradict provisions of a particular treaty or convention, a question arises as to which rule deserves priority. Advocates who support the position that treaties and conventions establish evidence of customary law argue that, as one state's practices cannot change customary law, state practices contrary to a treaty or convention are irrelevant.<sup>136</sup> For example, these advocates would argue that the fact that torture is prevalent in the world is irrelevant. The existence of conventions declaring torture illegal demonstrates that laws against torture exist as customary law.<sup>137</sup> Others, who support state practice as the true source of customary law, criticize the argument that treaty content is customary law, because it assumes what it seeks to prove—that the rule exists.<sup>138</sup> These commentators further argue that the "legislative" role that each nation plays in the international arena supports the position that state practice is the true underlying source of customary law.<sup>139</sup>

Despite this conflict, assuming an entitlement is identifiable, the

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133. *Id.* (citing D'Amato, *supra* note 114, at 1118).

134. *Id.* at 7.

135. *See, e.g.,* U.N. CHARTER arts. 92-96. One must consider the possibility that practice that simply mirrors a treaty obligation is performed only because of a state's sense of obligation. However, if many states have treaties with a similar provision, one may argue that the provision is customary by virtue of general consensus, and that the provision's general existence evinces an elevated level of consciousness with respect to its contents. *See, e.g.,* JANIS, *supra* note 115, at 39-40; BROWNLIE, *supra* note 115, at 6-7.

136. Weisburd, *supra* note 122, at 30-31.

137. *Convention Against Torture, supra* note 61.

138. Weisburd, *supra* note 122, at 30.

139. "The only way customary international law can change—and it certainly has changed significantly in the practice of states over the centuries—is by giving legal effect to

international community will attempt to maintain the entitlement<sup>140</sup> as part of customary law by responding to violations of it.<sup>141</sup> Unchallenged violations of a rule provide the “seed of a new rule,” which can form new customary law.<sup>142</sup> To prevent a new law from evolving, the international community protects the existing right by “declar[ing] the nation that violates [the] entitlement a temporary outlaw and . . . allow[ing] the nation or nations whose entitlements were violated . . . to retaliate [by] disregarding one or more of the outlaw nation’s entitlements.”<sup>143</sup> Because of the difficulty in formulating rules to constrict the choice of entitlements that a wronged nation may employ in retaliation, it appears that *any* of the outlaw nation’s entitlements may be deprived.<sup>144</sup> However, “[t]here is a strong consensus that the *same* entitlement may be violated.”<sup>145</sup> If the wronged nation chooses a different entitlement, the deprivation must be proportionate to the initial violation.<sup>146</sup>

This seemingly harsh result reflects the fact that the entitlements each nation acquires through customary law differ from that nation’s “interests.” Interests are those things desired by a state,<sup>147</sup> such as an internationally recognized prioritization among its entitlements mirroring its preferences.<sup>148</sup> Unlike entitlements, interests have no legal

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departures from preceding customary norms.” *Id.* at 31 (citing D’Amato, *supra* note 114, at 1118).

An interesting question arises as to whether state practice that violates international agreements, but is *denied* by the state, could change international rules. For example, could torture that is practiced frequently but usually denied by states ever affect the validity of the United Nation’s Convention Against Torture? Perhaps the secrecy of the torture suggests the public attitude: that it is illegal, and its denial is an acknowledgment of its illegality. See generally HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 84, at 48.

140. An “entitlement” is an obligation imposed or a right conferred on a state in the international arena. D’Amato, *supra* note 114, at 1113.

141. *Id.* at 1117.

142. *Id.* at 1118.

143. *Id.* at 1120. As a general guideline, retaliation is probably limited by human rights law and preemptory norms. For example, retaliation for the invasion of a sovereign nation could not be properly countered by randomly torturing individual citizens of that nation. This general guideline is not meant to contradict the later sections of this Comment that explore actions taken against belligerent nations that potentially violate human rights law.

144. *Id.*

145. *Id.*

146. *Id.*

147. For example, the United States may have an “interest” in abolishing the international oil cartels. Nonetheless, oil cartels, at present, do not violate any entitlements of the United States. *Id.* at 1114.

148. *Id.* at 1114-15.

relevance in the international arena.<sup>149</sup> Thus, the variation in "interests with respect to any particular entitlement . . . ensures the lack of . . . communal consensus as to relative importance among entitlements,"<sup>150</sup> and prevents the formation of a rule dictating the choice of allowable entitlements for retaliatory purposes.<sup>151</sup>

If consistent and widespread violations of an entitlement are not opposed, eventually customary law will no longer recognize that entitlement.<sup>152</sup> Assuming that human rights laws are entitlements and part of customary law, a proposition that this Comment neither supports nor denies, the lack of retaliatory measures in reaction to violations contributes to the demise of their status as entitlements recognized by customary law.<sup>153</sup> If this demise occurs, the Council would not violate any customary law if, through exercising its sanctioning powers, it denies a nation a particular human right recognized only by treaties to which not every member of the United Nations is a party.<sup>154</sup>

Nonetheless, declaring that a "rule is not a rule of international law merely because reparation does not always follow clear breaches of the rule"<sup>155</sup> fails to recognize that the "weakness of the international legal system makes enforcement of rules difficult even in . . . relatively clear cases."<sup>156</sup> One commentator, H.L.A. Hart, recognized this weakness and proposed an alternative theory. Hart reasoned that, by agreeing that international law is not binding due to its lack of enforceability by sanctions, one merely "accept[s] the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats."<sup>157</sup> This theory identifies, and almost

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149. *Id.* at 1115.

150. *Id.* at 1117.

151. *Id.*

152. *Id.* at 1117. This of course assumes that the violations are open and exercised as a matter of claimed right.

153. *Id.* at 1118. "[If other nations] accept the violation, a new customary rule is on its way toward being formed. . . . [The nations must] react to the violation of a customary rule . . . to ensure that the violation does not replace the old rule with its opposite." *Id.*

This argument intentionally ignores the fact that individual citizens have rights against their own states and third parties. Further, it does not address a situation in which the Council selects individuals or members of a particular race in a particular nation that it is sanctioning. It only address sanctions against *nations* consistent with its powers under the Charter.

154. It must be noted that action of the Council is not "retaliatory" in the sense that it seeks merely to punish. Rather, it constitutes allowable action under the Charter designed to rectify the problems caused by violations of peace. See U.N. CHARTER arts. 39-51.

155. Weisburd, *supra* note 122, at 9.

156. *Id.*

157. H.L.A. HART, THE CONCEPT OF LAW 212 (1986). This theory supports the propo-

equates, an obligation with the threat of a sanction or punishment for disobedience.<sup>158</sup> Hart proposes a normative idea that assesses rules as “guiding standards of behaviour.”<sup>159</sup> This theory expands the “idea of obligation [beyond] . . . rules supported by organized sanctions,”<sup>160</sup> and recognizes that states do not require the same threat of sanctions that those bound to municipal and domestic law require.<sup>161</sup> Indeed, the international community expresses these rules as obligatory, and pressures states to conform.<sup>162</sup> Further, the international community permits claims and insistent demands for compensation justified by breaches of the rules.<sup>163</sup>

Under Hart’s theory, entitlements under customary law do not lose their status as customary law simply because violators are not *punished*. Perhaps, to protect against the depreciation of an entitlement, mere identification of the violation will be sufficient to sustain the entitlement’s status as customary law.<sup>164</sup> Thus, if human rights law is customary law, and the Council deprives a nation of a protected human right, it is conceivable that a violation will have occurred because mere violations of the rule will not terminate the rule.

However, as discussed above, the international community permits the deprivation of an “outlaw” nation’s entitlements by the “nation or nations whose entitlements were violated.”<sup>165</sup> As violations of human rights law infringe the entitlements of every nation,<sup>166</sup> the Council’s actions against such outlaw nations merely represent the United Nations members’ choice of entitlement deprivation. Thus,

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sition that the Charter is not “law” because chapter VII’s enforcement provisions are often paralyzed by the veto power of the permanent members of the Council. *Id.* “Decisions of the Security Council on all [nonprocedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.” U.N. CHARTER art. 27, ¶ 3.

158. HART, *supra* note 157, at 212.

159. *Id.* at 213.

160. *Id.*

161. *Id.* at 214. This idea recognizes that states are often peaceful for long periods of time, regulated by rules not enforced by any central organ or backed by any organized sanctions. *Id.* But, even in domestic law, a rule remains “law” even if it is seldom enforced.

162. *Id.* at 214-15.

163. *Id.*

164. This approach appears to be the reality in the international world with respect to violations of human rights. Often, the international community identifies and declares certain state actions to be violations, without sanctioning the violator. See Otto Friedrich, *Master of His Universe*, TIME, Aug. 13, 1990, at 24 (discussion of Saddam Hussein and the use of poison gas against the Kurds).

165. D’Amato, *supra* note 114, at 1120.

166. *Id.* at 1126.



under currently accepted principles of international law, the Council's use of its sanctioning power is not per se violative of human rights law, even though it may deprive a nation of one of its human rights. Consequently, customary human rights law cannot act as a per se limit on the Council's enforcement powers.

*a. Which Entitlements May Be Deprived*

The position that the Council may retaliate against a nation by depriving that nation of an entitlement implicating a human right is a harsh one.<sup>167</sup> Allowing such retaliation ignores the fact that individuals, as well as states, have rights under human rights law.<sup>168</sup>

To alleviate the harshness of this result, perhaps not all rights or entitlements should be subject to deprivation. Perhaps, as recognized in the United States Constitution, certain rights are inalienable. Inalienable, however, is not the definitional equivalent of absolute.<sup>169</sup> For example, the United States Constitution protects life as an inalienable right,<sup>170</sup> yet many states still employ the death penalty as a means of

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167. For example, if the Council sanctions a total blockade of a nation under its article 42 powers, the blockade could ultimately implicate the right of each individual in that nation to live and not die of starvation. See, e.g., *Universal Declaration*, *supra* note 78.

168. JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 3 (1987).

169. Webster's Dictionary defines "absolute" as:

1. literally, in a general sense, free or independent of anything extraneous.
2. complete in itself; whole.
3. unconditional.
4. existing independent of any other cause.
5. unlimited by extraneous power or control.

WEBSTER'S UNABRIDGED DICTIONARY 7 (2d ed. 1983).

In contrast, Webster defines "inalienable" as that which "cannot be legally or justly alienated or transferred to another." *Id.* at 919.

170. The United States Constitution protects the inalienable right to life because it embodies the principles set forth in the Declaration of Independence. JOHN Q. ADAMS, *THE JUBILEE OF THE CONSTITUTION: A DISCOURSE* (APRIL 30, 1839) 54 (1972) ("Now the *virtue* which had been infused into the Constitution of the United States . . . was no other than the concretion of those abstract principles which had been first proclaimed in the Declaration of Independence—namely, the self-evident truths of the natural and unalienable rights of man . . ."); see also E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* at viii (1957) ("[T]he American Bill of Rights . . . was the vehicle whereby the political philosophy of the Declaration of Independence was incorporated into the Constitution."). Specifically, the Constitution incorporates the Declaration of Independence's pronouncement that "all Men . . . are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness." *McGowen v. Maryland*, 366 U.S. 420, 563, (1961) (quoting the Declaration of Independence). Indeed, a number of Supreme Court cases uphold and support this concept. See, e.g., *id.* ("And the body of the Constitution as well as the Bill of Rights enshrined those principles [contained in the Declaration of Independence]."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he fundamental rights to life, liberty, and the pursuit of happiness . . . are secured by those maxims of constitutional law which are the monu-

punishment.<sup>171</sup> Similarly, although constitutional due process procedures guard the right to life,<sup>172</sup> in some instances, other considerations conflict with this right and lead to its deprivation. Therefore, although inalienable rights are powerful considerations, they are not absolute and may be deprived.<sup>173</sup>

The International Covenant on Civil and Political Rights reflects the view that rights are subject to deprivation.<sup>174</sup> Although article 6 of the Covenant declares that "[e]very human being has the inherent right to life," it qualifies this declaration by stating that "[n]o one shall be arbitrarily deprived of his life."<sup>175</sup> The Covenant, like the United States Constitution, does not declare this right absolute. Rather, it protects only against *arbitrary* deprivation.<sup>176</sup>

The preceding discussion on the death penalty assumes that the individual deprived of life was somehow the catalyst who provoked its deprivation. The situation is drastically altered if the deprived individual is "innocent." Here lies the quandary with respect to Council actions that implicate deprivation of the human rights of "innocent" citizens of a belligerent nation. But, are citizens of a belligerent nation truly "innocent," such that the Council's sanctions depriving them of human rights is unjust? Many would answer in the affirmative, but this Comment proposes an alternative view.

Individuals, as citizens of a nation, have the obligation to exercise civil disobedience: "Unjust laws exist[,] shall we be content to obey them, or shall we endeavor to amend them, and obey them until

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ments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . ."); *Monogahela Navigation Co. v. U.S.*, 148 U.S. 312, 324 (1893) (stating that the adoption of the Bill of Rights was to protect "those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights").

171. Currently, 36 states allow the death penalty as a means of punishment. See *THE WORLD ALMANAC AND BOOK OF FACTS 1991* (Mark S. Hoffman ed., 1990).

172. See U.S. CONST. amend. V. "[No person shall] be deprived of life, liberty or property, without due process of law." *Id.*

173. NICKEL, *supra* note 168, at 17. "[T]he weight of a particular right is relative to other considerations at work in a given context." *Id.* One commentator, Ronald Dworkin, supports this view by his theory that rights are "trumps." He suggests that, although rights generally prevail in competition with other concerns, they do not always prevail. *Id.* at 16-17 (discussing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 92 (1977)).

174. See *Covenant on Civil and Political Rights*, *supra* note 61.

175. *Id.* art. 6.

176. *Id.* If the Covenant intended to grant an absolute right to life, the sentence outlawing arbitrary deprivation would be superfluous and unnecessary. Documents should generally be read such that no particular clause or provision is redundant or superfluous. SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 65, § 46.06.

we have succeeded, or shall we transgress them at once?"<sup>177</sup> Indeed, "[i]f the injustice . . . is of such a nature that it requires you to be the agent of injustice to another, then . . . break the law."<sup>178</sup> If citizens observe their government engaging in actions that violate international treaties or agreements, or in actions that may lead their nation to war, those citizens have "the right of revolution; that is, the right to refuse allegiance to, and to resist, the government."<sup>179</sup> If citizens fail to exercise this right,<sup>180</sup> they must bear responsibility for any government action that leads to retaliation.<sup>181</sup> By remaining silent, the citizens support the government's action.

Placing responsibility for inaction upon those cognizant of their government's wrongdoing is not an unjust result. What, though, of the citizens who do respond, vocalize, or demonstrate objection, but to no avail? And, what of the citizens who claim ignorance due to their lack of accurate information of the true state of affairs caused by misleading or censored news reports? Although the world may categorize these individuals as "innocent" victims, one must scrutinize the legitimacy of this innocence. On balance, even these citizens must be held accountable. With respect to the "misled," no one could accurately judge the validity of their positions. Fabrications would mirror truths, and reaching inside another's heart and mind to subjectively determine whether sufficient doubts or suspicions existed to justify an expectation of action against the government is impossible. The vocal, but ineffective, citizens present the beginning of where hard decisions must be made. Nonetheless, despite their unfortunate predicament, they are not the truly "innocent" because of their capacity to perceive and make decisions.<sup>182</sup>

Thus, the only truly "innocent" citizens are those incapable of perception and differentiation of wrongdoings: the very young, the

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177. HENRY D. THOREAU, CIVIL DISOBEDIENCE 350 (1972).

178. *Id.* at 351. At times, individuals must "do justice . . . cost what it may." *Id.* at 347.

179. *Id.* at 346.

180. *Id.* at 344.

181. The citizens must bear responsibility, because blind resignation of conscience to the government, and undue respect for the law, cannot exculpate the citizens from their obligation to do what is right. *Id.*

Law never made men a whit more just; and, by means of . . . respect for it, even the well-disposed are daily made the agents of injustice. A common and natural result of an undue respect for law is . . . marching . . . to the wars, against . . . wills, ay, against . . . common sense and consciences.

*Id.* at 344-45.

182. The rationale for why these citizens must be held accountable is left for discussion in the next section.

very old, and the infirm. Injustice rears its ugly head when those in these categories fall victim to retaliation for a wrong they could neither perceive nor counteract, thus presenting a most unfortunate and unpleasant dilemma.

*b. Weighing the Interests*

The dilemma of whether the truly "innocent" should ever be subjected to the consequences of retaliation against an unyielding government in its aggressive stance poses a difficult problem. Nonetheless, the existence of an aggressor who could ultimately destroy not only international peace and security, but a race or humanity itself, offers a countervailing interest that demands serious consideration.

The preceding scenario pits the world's welfare against the lives of the "innocent" victims caught in a belligerent nation. To weigh in favor of the "innocent" citizens and protect their lives at all costs reflects the view that pure and unyielding principles, regardless of the situation, must guide all decisions. For example, this view rejects the reasoning that, in order to save lives, one must drop a bomb on a Japanese civilian city to stop a war that could potentially cost many more lives.<sup>183</sup>

Although a system dictated strictly by principles and liberties is preferable, blind valuation of liberties stalemate and paralyze nations, such that liberties and principles are lost due to a nation's inability to protect itself.<sup>184</sup> For instance, Iraq's president, Saddam Hussein, not only invaded a recognized sovereign nation,<sup>185</sup> but allegedly violated numerous human rights of Kuwaiti citizens and foreign nationals.<sup>186</sup> If the world allows Hussein to use the human rights of his citizens as a shield against retaliation, Hussein has been granted more rights

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183. BERNARD BRODIE, *WAR AND POLITICS* 51 (1973). Brodie speaks of the conventional bombing of Tokyo the night of May 23, 1945, which created a fire-storm due to the number of bombs which were dropped. A fire-storm is a phenomenon in which flames create strong winds and fan the fire into greater intensity. This bombing took the lives of 83,000 to 100,000 people, many from asphyxiation. Brodie compares this incident with Hiroshima. He states that, although the one bomb dropped on Hiroshima is a comparable horror, it can hardly be said that Hiroshima was worse, as the number of fatalities was substantially fewer. *Id.* Although the Japanese people of Hiroshima and Nagasaki paid a terrible price, the raids planned for Japan, only three months in the future, "would have been a blood bath for Japanese and Americans alike." *Id.* at 54.

184. PLATO'S *REPUBLIC* 212 (G.M.A. Grube trans., 1974). "[E]xcessive liberty, whether in the individual or the state, is likely to change to excessive servitude." *Id.*

185. *A New Reality in Mideast: Now Hussein Is in Charge*, L.A. TIMES, Aug. 3, 1990, at A1, col. 5.

186. Lisa Beyer, *Iraq's Power Grab*, TIME, Aug. 13, 1990, at 19.

than the rest of the world combined. By equalizing the liberties of citizens in the aggressor nation with those of the rest of the world, international response may be stalemated, rendering the world incapable of adequately protecting its own liberties; the same liberties that it respects in the aggressor nation.<sup>187</sup> The resulting paralysis could unjustly advantage the aggressor nation and lead to a greater, rather than decreased, deprivation of liberty.<sup>188</sup> Although a laudable aspiration, simplistic pursuit of equalization of liberties represents a standard that is neither practical, nor safely obtainable, at the present time.<sup>189</sup>

Balancing the lives of "innocent" citizens of a belligerent nation against the welfare of the entire world poses a difficult choice. Nevertheless, there is a realistic possibility that such a choice may have to be made. The view proposed by this Comment offers a more

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187. Cf. PLATO'S REPUBLIC, *supra* note 184, at 209. Socrates argues that equalizing all liberties would eventually turn any democracy into a dictatorship. *Id.* at 210-11.

188. *Id.* at 210. "Now insatiability for what [is] define[d] as the good also destroys . . . that insatiability regarding [liberty], and neglect of other things because of it." *Id.* Plato illustrates how a democracy evolves into a dictatorship because the absolute quest for its finest possession, liberty, destroys the very rules by which people live:

Rulers . . . behave like subjects and subjects . . . behave like rulers. . . . [A] father . . . behave[s] like a child and . . . fear[s] his sons, while the son behaves like a father. . . . A resident alien is the equal of a citizen and a citizen the equal of a resident alien, and so too a foreign visitor. . . . [E]xcessive action in one direction usually sets up a reaction in the opposite direction. . . . So excessive liberty . . . is likely to change to excessive servitude. . . .

*Id.* at 210-12.

189. This is not to suggest that the world should not continue its quest to attain a world in which the importance of each individual prevails. Even Thoreau, in *Civil Disobedience*, ends his book on this optimistic note:

There will never be a really free and enlightened State, until the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treat him accordingly. I please myself with imagining a State at last which can afford to be just to all men, and to treat the individual with respect as a neighbor.

THOREAU, *supra* note 177, at 364.

This Comment's objection is that most nations do *not* recognize individuals as the "higher and independent power," nor do they respect individuals and treat them with justice. *Id.* Consider, for example, the massacre of protesting students in China's Tiananmen Square, the Nazis' murder of six million Jews during the Holocaust, and Iraq's use of chemical warfare against its own people. See generally *Beijing Bloodbath*, NEWSWEEK, June 12, 1989, at 24; *German Parliament Head Resigns After Hitler Speech*, L.A. TIMES, Nov. 13, 1988, at 1, col. 1; Otto Friedrich, *Master of His Universe*, TIME, Aug. 13, 1990, at 24. When a nation becomes an aggressor, the world must respond and realize that, if the aggression is not controlled, the aggressor's attitude towards individuals, as reflected by its treatment of its citizens, will be directed at every individual of the world. Since all nations must protect their citizens, when responding to aggression they must assume that their own citizens are at risk, and place the safety of their citizens above those of the aggressor.

favorable outcome than one espousing a simple and uncompromising equalization of liberties. Specifically, this Comment's proposal provides that the survival of *humanity*, not of any one individual or group of individuals, is the controlling factor in determining the outcome of the balance, by analyzing life-cost and risk allocations.

Citizens who remain silent, because of fear<sup>190</sup> or ignorance,<sup>191</sup> must bear the risk of living in that society. This risk *cannot* be borne by other nations of the world; otherwise, a belligerent nation could use its silent citizens as a shield against retaliation.<sup>192</sup> This shield would expand a hostile nation's rights vis-à-vis every other nation. These "silent" citizens are thus transformed into military tools to protect the government. As a result, they must be treated as part of their nation's military force.

The notion that the risk must be borne by the individual affected, and not by the rest of the world, also explains why the vocal but ineffective citizens, as well as the truly "innocent," must lose in the balance. The hard reality is that these citizens must bear the risk of failing to remedy their situations by taking actions, such as leaving the nation.

The effects of this choice fall most severely on those who are truly "innocent" and in need of protection. Unfortunately, when an aggressor jeopardizes the survival of humanity, the need to rid the world of the aggressor must dictate the proper responses. For example, the world is cognizant of the fact that Iraq's President Hussein has used chemical warfare against his own citizens and those of another nation.<sup>193</sup> For the world to assume that Hussein will not employ other weapons of mass destruction, such as biological or nuclear weapons, is absurd and irresponsible.<sup>194</sup> This leader's aggression must

190. "Fear" refers to the fear of reprisal from the opposition. THOREAU, *supra* note 177, at 350. "They think that, if they should resist, the remedy would be worse than the evil." *Id.*

191. "Ignorance" refers to those citizens who claim to have been "misled." *Id.*

192. "It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong . . . but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support." *Id.* at 349.

193. Friedrich, *supra* note 164, at 24.

194. Cf. PLATO'S REPUBLIC, *supra* note 184, at 209-10. Socrates depicts a society that values every liberty equally at all times, such that no reason enters into the decision-making process:

[The Nations] do[] not welcome true reasoning or allow it into the guardhouse; if someone tells [them] that some [choices] belong to good and beautiful desires, but others belong to evil ones, that one should . . . pursue the former while the latter must be restrained and mastered, [the Nations] den[y] all this and declare[] that all [choices] are equal and must be equally prized.

be eradicated to ensure the peace and security of the world. Thus, to prevent a potentially greater loss of human rights around the world, part of the cost, unfortunately, may be the suspension or loss of human rights of the "innocent" in the aggressor's nation.

Although an extremely harsh result, the survival of humanity is dependent upon this view. For this reason, the United Nations must be fully empowered to maintain peace and security. If peace is secured, every individual's risk of living in a particular society is reduced. Some may argue that this approach sacrifices the law to save lives. But if an aggressor, like Hussein, is allowed to survive and ultimately destroy the rest of the world, who will be left to enjoy the laws? This view, at a minimum, allows the potential for the survivors to ultimately achieve the higher aspiration, and be able to make every decision in light of their reverence for each individual's life on earth.

The member nations, in ratifying the Charter, granted power to the Council.<sup>195</sup> Thus, they are on notice of the Council's Chapter VII powers and cannot escape responsibility for actions that provoke the use of these powers. If the world fails to empower the United Nations with the ability to fulfill its goal of international peace and security, the goal of protecting and promoting human rights will also fail. For, how can a world engulfed in strife protect humanity? Humanity includes every citizen of every nation, not only the citizens of belligerent nations whose leaderships endanger the human rights of neighboring nations and, potentially, those of the entire world.

#### IV. CONCLUSION

The United Nations is a body of nations formed in the aftermath of war, in an atmosphere of fear—fear of another world tragedy. Thus, the initial intent and strongest component of the Charter is the maintenance of peace and security in the world. In the years following its formation, the United Nations pursued more lofty goals. The United Nations not only encouraged human rights, but affirmatively declared a "common standard of achievement for all peoples and all

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*Id.*

In fact, as recently as October 1991, United Nations inspectors found evidence that Hussein would have had nuclear capability within 12-18 months. This discovery came only months after the Gulf War ended on March 3, 1991. See Tyler Marshall, *Iraq Nearly Had Own A-Bomb, U.N. Finds*, L.A. TIMES, Oct. 5, 1991, at A1; Steve Coll & Guy Gugliotta, *Iran Accepts All Cease-Fire Terms, May Soon Release Some Prisoners; Schwarzkopf: 'Major Step' Toward Peace*, WASH. POST, March 4, 1991, at A1.

195. U.N. CHARTER art. 25.

nations" through the Universal Declaration,<sup>196</sup> and through its resolutions, the United Nations condemned, and continues to condemn, violations of human rights.<sup>197</sup>

The Council's power seems to be limited only by interpretations of the Charter and the actions of the United Nations itself. Only if the rules of customary international law change to disallow deprivation of entitlements will customary international law limit the Council's actions. Although this is a powerful proposition which appears to impose little restraint on the Council, the Charter must be considered in light of the underlying basic premise upon which it was written. The Charter was written with the cooperation of nations for the protection of nations and individuals. Thus, "any who place their ambitions or their dogmas or their prestige above the peace of all the world" must be restrained "by joint and effective action."<sup>198</sup> When a belligerent nation "hides" behind human rights, restraining the Council betrays the rest of the world, risking its survival, and "use[s] [the Charter] selfishly for [the] advantage of . . . one nation . . . ."<sup>199</sup>

As technology develops, and biological and chemical weapons become more readily accessible, small countries and groups may hold the entire world hostage. The power of the Charter must be flexible, such that response to new terrors is possible. The opinion of the world should dictate, not merely one man or one country. It is only through a united will that the Charter will prove successful.<sup>200</sup> This unity of will provides the greatest limitation on the Charter, as it reflects the desires of the world, not merely those of the members of the Council.

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196. *Universal Declaration*, *supra* note 78, pmbl.

197. Consider, for example, the economic and diplomatic sanctions imposed on South Africa in protest of apartheid. *HUMAN RIGHTS IN THE WORLD COMMUNITY*, *supra* note 86, at 51; see also *Nuremberg*, *supra* note 61; *Convention Against Torture*, *supra* note 61.

198. *WATERS*, *supra* note 18, at 18.

199. *Id.* at 16.

200. *Id.*

\* With special thanks to Professor George C. Garbesi.



